APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD D. SANDBERG; ALBERTA M. SANDBERG; DICK SANDBERG INSURANCE AGENCY, INC., a California Corporation, Plaintiffs-Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation; STATE FARM FIRE AND CASUALTY COMPANY; a corporation; STATE FARM LIFE INSURANCE COMPANY, a corporation; STATE FARM GENERAL INSURANCE COMPANY, a corporation, Defendants-Appellees.	No. 97-55971 D.C. No. CV-96-00323-GLT MEMORANDUM*

Appeal from the United State District Court for the Central District of California Gary L. Taylor, District Judge, Presiding

Argued and Submitted February 1, 1999
Pasadena, California

Before: HUG, Chief Judge, BROWNING and NOONAN, Circuit Judges

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

This is a breach of contract case arising from the termination of an insurance agent's agency agreement. Sandberg, a former State Farm agent, contends that the District Court erred in granting summary judgment to State Farm, as the fully integrated agency agreement is reasonably susceptible to Sandberg's interpretation - that the agreement could be terminated only for cause. We have jurisdiction pursuant to 28 U.S.C. §1291 and we affirm. The parties are familiar with the factual and procedural history of the case; therefore, we will not recount it here.

Sandberg argues on appeal that the District Court erred in granting summary judgment to State Farm as Sandberg's extrinsic evidence was not barred by the parol evidence rule. Whether the agency agreement is reasonably susceptible to Sandberg's interpretation is a matter of law that is reviewed de novo. Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272, 277 (9th Cir. 1992). "Under California contract law, the parol evidence analysis governing this case is divided into two initial inquiries: '1) was the writing intended to be an integration, i.e. a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements; and 2) is the agreement susceptible of the meaning contended for by the party offering the evidence?'" Id. at 276-77 (quoting Gerlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 282 (Cal. Ct. App. 1987)).

Because the agency agreement contained an express integration clause, and Sandberg does not challenge the validity of that provision, the District Court properly concluded that the agreement was integrated.

The agreement provided that "[t]he Agent or State Farm have the right to terminate this Agreement by written notice..." To determine whether this provision is susceptible to a termination-only-for-cause interpretation, the court must consider the "circumstances surrounding the making of the

agreement including the object, nature and subject matter of the writing so that the court can place itself in the same situation in which the parties found themselves at the time of contracting." Jack Rowe Associates, Inc. v. Fisher Corp.. 833 F.2d 177, 181 (9th Cir. 1987) (ellipses omitted, quoting Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal.1968)).

Two extrinsic facts support Sandberg's argument that the agreement could be terminated only for good cause: 1) Sandberg's original agency agreement, which provided for termination "with or without cause," was allegedly a subject of concern for Sandberg and his fellow agents until State Farm modified the agreement and omitted the "with or without cause" language; and 2) in a 1977 article entitled "Termination Procedures -- how the agent's protected," State Farm's Vice President for Agencies discussed the company's termination review procedure and explained that termination would occur only when "the file clearly supports a serious violation of a contract agreement...."

Viewing the evidence in the light most favorable to Sandberg, we hold that the agreement is reasonably susceptible to a termination-for-cause interpretation. See Wallis v. Farmers Group, Inc., 269 Cal. Rptr. 299, 306-07 (Cal. Ct. App. 1990) (agreement providing for termination by either party with written notice susceptible to termination-for-cause interpretation where company modified agreement to omit "without cause" language, provided termination review process, and stated that the agreements would not terminated without cause);[1] Jack Rowe Assocs., 833 F.2d at 180-82 (party received

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[1]We disagree with State Farm's assertions that Wallis is distinguishable simply because the agreement in that case was not completely integrated. The agreement "was integrated with

(continued...)

oral assurances that agreement would be terminated for good cause); Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782,783-84 (9th Cir. 1980) (agreement providing for termination by either party with written notice or by the insurance company "if in its judgment its interests so require" susceptible to termination-for-cause interpretation where agent had given up a profitable business in exchange for long-term prospects associated with the insurance industry).

However, State Farm argues that Sandberg was terminated for good cause. Good cause means a fair and honest reason, regulated by good faith, that is not "trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual." Cotran v. Rollins Hudig Hall Int'l, Inc., 69 Cal. Rptr. 2d 900, 910 (Cal. 1998). Sandberg filed an action against State Farm, which included a claim for punitive damages for fraud. As a policy holder, Sandberg was justified in seeking the full amount of compensation to which he claimed entitlement under the policy. However, seeking punitive damages, which did not involve anything that he was entitled to under the policy and did involve a claim of fraud, would certainly be cause for termination.

While we agree with Sandberg's interpretation that the agency agreement limited termination to good cause, we hold that Sandberg's claim for punitive damages is sufficient "good cause" to support State Farm's decision to terminate.

(...continued)

respect to the subject of termination," 269 Cal. Rptr. at 306, and "parties may reduce only part of their agreement to writing, leaving the rest to their oral understanding. In such a case, that integrated part is protected by the parol evidence rule in the same manner as if the whole contract were integrated." Witkin, California Evidence § 969 (3d ed. 1986).

AFFIRMED.

[FILED: May 13, 1999]

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD D. SANDBERG, et al., Plaintiff,	)	Case No. SA CV 96-323-GLT (EEx)
v.	)	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., Defendants.	)	

Defendants' motion for summary judgment is GRANTED.

Plaintiffs Richard Sandberg and Dick Sandberg Insurance Agency (collectively "Sandberg") filed this action against State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm Life Insurance Company and State Farm General Insurance Company (collectively "State Farm") following State Farm's termination of its relationship with Sandberg. State Farm now moves for summary judgment.

A party seeking summary judgment bears the initial responsibility of identifying those portions of the pleadings, depositions, and admissions which together with any affidavits demonstrate the absence of a genuine issue of material fact. Celotex v. Catrett, 106 S. Ct. 2548, 2553 (1986).

Generally, a factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986). In other words, the nonmoving party must produce evidence that could cause reasonable persons to disagree on whether the facts claimed by the moving party are true: "enough to require a jury or judge to resolve the parties' differing versions of the truth." Aydin v. Loral Corp., 718 F.2d 897, 902 (9th Cir. 1983). Furthermore, the court must view the evidence presented in the light most favorable to the nonmoving party, with "all justifiable inferences . . . drawn in his favor." Anderson, supra, 477 U.S. at 255, 106 S. Ct. at 2513.

At this stage of litigation, Sandberg has agreed to dismiss all causes of action in the complaint except those based on three theories of recovery: (1) Breach of contract; (2) Breach of the implied covenant of good faith and fair dealing (contractual); and, (3) violation of public policy (termination which deprives Sandberg of the good will of his agency by compelling premature sale). Because the Court finds Sandberg cannot recover based on any of these theories, State Farm is entitled to summary judgment, and it is unnecessary to identify which of Sandberg's causes of action were dismissed voluntarily and which are disposed of by this order.

Sandberg was an agent for State Farm from 1952 through 1994. The parties defined the terms of their relationship in an agency agreement ("Agreement") which was revised most recently in 1979 to reflect Sandberg's decision to form a California corporation to conduct his business as an insurance agent (plaintiff Agency). The Agreement remained in effect until State Farm terminated it in October 1994. Sandberg asserts the termination violated the Agreement because State Farm lacked good cause for termination. Although the Agreement does not specify termination may only

occur for good cause, Sandberg contends that term is implied in the Agreement.

Section III A. of the Agreement states "[t]he Agent or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the owner's last known address." Nowhere does the Agreement specify termination may only occur for cause.

Sandberg cites Section III B. of the Agreement in support of the contention the Agreement was terminable only for cause. That section provides: "In the event [State Farm] terminate[s] this Agreement, [the agent is] entitled upon request to a review in accordance with the termination review procedures approved by the Board of Directors of the Companies..." However, Sandberg cites no language limiting the parties' ability to terminate the contract. The availability of review does not independently limit State Farm's discretion to terminate the Agreement.

In addition to the review procedures, Sandberg cites statements made by State Farm employees indicating agency agreements would be terminated only for cause. In part this argument is undercut by Richard Sandberg's deposition testimony that he did not believe the Agreement was subject to just cause termination. Moreover, Sandberg may not rely on extrinsic evidence to support the breach of contract claim.

Section VI F. of the Agreement states:

> This Agreement shall supersede all prior agreements between the parties hereto, written or otherwise, and it shall constitute the sole and entire Agreement between the parties, and no change, alteration, or modification of the terms of this Agreement may be made except by agreement in writing signed by a Regional Vice

> President or an Agency Vice President of the Companies and accepted by the Agent.

This clause, an integration clause, renders extrinsic evidence admissible only if it is relevant to prove a meaning to which the language of the instrument is reasonable susceptible. Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co., 69 Cal.2d 33, 37, 69 Cal. Rptr. 561 (1968).

In examining termination language similar to that in the Agreement, California courts have found a contract terminable without cause. Anderson v. Savin Corp., 206 Cal. App.3d 356, 363, 254 Cal. Rptr. 627 (1988) (term specifying agreement was terminable by either party in its discretion at any time on 5 days' notice created at-will contract). See also, Mooney v. State Farm Ins. Cos., 344 F. Supp. 697, 699 (D.N.H. 1972) (identical language unambiguously creates at-will contract). Consequently, parol evidence contradicting this term is inadmissable.

Sandberg cites Wallis v. Farmers Group, Inc., a California Court of Appeal case finding parol evidence admissible to determine whether an insurance agent's contract with the insurance company was terminable at will. 220 Cal. App.3d 718, 732-33, 269 Cal. Rptr. 299 (1990). However, the agreement in Wallis was found to be only partially integrated because it failed to detail commission arrangements, referenced other existing agreements and did not state it was the entire understanding of the parties. Id. at 729 - 30. None of those factors is present here and the Agreement specifies it is the entire understanding of the parties.

The Court concludes the Agreement is fully integrated. The Agreement unambiguously establishes it is terminable at-will. Consequently Sandberg's breach of contract theory fails.

Under California law, a plaintiff must demonstrate a breach of an enforceable contract to maintain an action for breach of the implied covenant of good faith and fair dealing. Foley v. Interactive Data Corp., 47 Cal.3d 654, 684, 254 Cal. Rptr. 211 (1988). The courts have not recognized a cause of action based solely on the implied covenant. Newfield v. Ins. Co. of the West, 156 Cal. App.3d 440, 445, 203 Cal. Rptr. 9 (1984). Because Sandberg's breach of contract theory fails, the breach of implied covenant theory necessarily fails as well.

Finally, relying primarily on a recent concurring opinion in a Tax Court case, Sandberg asserts the termination of the Agreement was a violation of public policy because it caused a premature sale of the goodwill associated with the agency. In Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 164 Cal. Rptr. 839 (1980), the California Supreme Court recognized a tort action under California law for at-will employees who were terminated "for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn." Gantt v. Sentry Ins., 1 Cal.4th 1083, 1090, 4 Cal. Rptr.2d 874 (1992). Sandberg contends the termination is actionable even assuming the Agreement was terminable at-will because it falls into the "public policy" exception.

California law recognizes the public policy exception in employee-employer relationships. Harris v. Atlantic Richfield Co., 14 Cal. App.4th 70, 17 Cal. Rptr.2d 649 (1993) (citing Premier Wine & Spirits v. E. & J. Gallo Winery, 846 F.2d 537 (9th Cir. 1988). Sandberg admits it was not an employee of State Farm but instead an independent contractor. As such, the public policy theory of recovery is unavailable.

In addition, to maintain a claim based on the public policy exception, a plaintiff must identify a policy delineated in constitutional or statutory provisions. Gantt, 1 Cal.4th at 1095. Sandberg identified no California statute or constitutional provision prohibiting the forced premature sale of good will.

As such, even were the public policy exception available in this context, State Farm would be entitled to summary judgment.

DATED: May 19, 1997.

/s/
GARY L. TAYLOR
UNITED STATES DISTRICT
JUDGE

[ENTERED: May 30, 1999]

APPENDIX C

DOCKET NUMBER 97-55971

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD D. SANDBERG; ALBERTA M. SANDBERG; DICK SANDBERG INSURANCE AGENCY, INC., a corporation,	)	COURT OF APPEALS DOCKET NO. 97-55971
Plaintiffs-Appellants,	)	
v.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation; STATE FARM FIRE AND CASUALTY COMPANY, a corporation; STATE FARM GENERAL INSURANCE COMPANY, a corporation; and DOES 1 through 100, inclusive,	)	
Defendants-Appellee	)	

Appeal From the United States District Court
For The Central District of California
CASE NO. SACV 96-323-GLT (EEx)

PETITION FOR PANEL REHEARING
Submitted by Appellants

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May 26, 1999

INTRODUCTION AND STATEMENT OF COUNSEL

Pursuant to FRAP 40, Appellant RICHARD D. SANDBERG hereby petitions this Court for a panel rehearing on the ground that the decision of this Court overlooked facts in the record which establish issues of fact for a jury as to whether State Farm had "good cause" to terminate Sandberg's insurance agency. This evidence establishes that triable issues of fact exist as to (1) whether State Farm's proffered reason for terminating Sandberg was pretextual and (2) whether the stated reasons for the termination were related to legitimate business purposes. **IN COUNSELS' JUDGMENT, A REHEARING IS WARRANTED BECAUSE MATERIAL POINTS OF FACT AND LAW HAVE BEEN OVERLOOKED IN THE DECISION OF THIS COURT WITH RESPECT TO THESE TWO ISSUES.**

On page 5 of the decision, the Court, citing Cotran v. Rollins Hudig Hall International Inc. (1998) 69 Cal.Rptr.2d 900 [17 Cal.4th 93], defines "good cause" as:

> "...a fair and honest reason, regulated by good faith, that is not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual."

Based upon this definition, this Court concluded that the fact that Sandberg sought punitive damages in his homeowners' action established good cause for termination. (page 5 of decision).

In so holding, this Court overlooked the further holding of the California Supreme Court in Cotran that the cited definition (for good cause) is an "objective good faith standard" and that the question of whether the standard has been met is a factual inquiry directed to the jury. (Id. at 909-910). As stated by the court in Cotran:

> "The proper inquiry for the jury, in other words, is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?'" (Id. at 909-910).

See also Wallis v. Farmers Group, Inc. (1990) 269 Cal.Rptr. 299 [220 Cal.App.3d 718] where the court noted that if "the evidence is contradicted (as to whether good cause exists), the issue is one for the trier of fact to decide." (Id. at 308).

Specific evidence submitted by Sandberg in opposition to State Farm's motion for summary judgment, which refuted State Farm's proffered reason for terminating Sandberg, and

which was overlooked by this Court in its conclusion on the "good cause issue", can be summarized as follows:[1]

1. William Seidler, State Farm's regional vice-president stated (in deposition testimony) that the statements in the homeowner's lawsuit "put us [State Farm] in jeopardy with every policyholder that we dealt with that have a similar type of claim or action" **[SEIDLER DEPO. P.155, L:7-9, EXCERPTS OF RECORD AT TAB 8 P.139]**. Seidler told Sandberg that his statements could cost State Farm "millions of dollars" (not as a result of Sandberg's punitive damage claim, but as a result of the misconduct by State Farm that Sandberg had discovered). **[SANDBERG DEC. ¶ 31, TAB NO. 6 IN THE EXCERPTS OF RECORD PP. 130-131]**.

2. Sandberg stated in his declaration, and contended in opposition to the motion, that he was in fact terminated by State Farm for his activities with NASFA (the National Association of State Farm Agents) and that State Farm "used the homeowner's claim as a pretext". **[SANDBERG DEC. ¶ 34, TAB NO. 6 IN THE EXCERPTS OF RECORD P.131]**.

3. Sandberg was an active participant in, and founder of, the Southern California chapter of "NASFA", which was organized to confront State Farm collectively on issues that agents felt infringed on their rights. Sandberg vigorously led and championed the agents' interests in disputes with State Farm, and his courage inspired others who were otherwise afraid to be associated with NASFA. The evidence established that State Farm was vehemently opposed to NASFA and its agents' participation with that association. **[See**

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[1]All of the referenced evidence is more extensively discussed in the opening BRIEF OF APPELLANTS. [See opening BRIEF OF APPELLANTS (hereafter "APPELLANTS BRIEF"), p. 4, L:21 through p. 13, L:2; and pp. 23-28].

APPELLANTS BRIEF, P.8 L:20 to P.9, L:15 -- with reference to supporting evidence from SANDBERG DEC, TAB NO. 6 OF EXCERPTS, AND JULIAN DEC. TAB NO. 7 OF EXCERPTS].

4. Members of the Sandberg's termination review board (selected by State Farm) made statements in their depositions that support Sandberg's pretext contention. **[HESS DEPO. P. 64, L:14-22 - EXCERPTS OF RECORD AT TAB 9 P.143; P. 92, L:22 TO P. 93, L:1 - EXCERPTS AT TAB 9 PP. 141-142; P.95, L:1-6 - EXCERPTS AT TAB 9 P. 144]**. Cosmo Conte, a member of the review board, in answer to a question about sending a message to other agents through the Sandberg termination, said "I know it was a feeling that I had" and that "other people sitting in that room would have -- that when you terminate an agent....that it would affect the attitudes of a lot of agents." **[CONTE DEPO. P. 66, L:20 TO P.67, L:3 - EXCERPTS AT TAB 10 PP.145-146]**. Mr. Conte also stated that to him (Conte) "its a matter of loyalty. There are things that the association is involved in that State Farm doesn't support that are anti-State Farm. So its a matter of where my allegiances are. And my first allegiance is to State Farm." **[CONTE DEPO. P. 83, L:11-19 - EXCERPTS AT TAB 10 P. 149]**.

5. Paul Julian, one of the principal founders of NASFA and one of its past presidents, submitted a declaration that stated that State Farm had been terminating agents on grounds that "appeared to be a pretext" and that it was his belief, based upon his own "personal knowledge of the" "facts", that the State Farm termination of Sandberg "was obviously designed to send a message to the Southern California chapter" (of NASFA), and that State Farm's plan succeeded because "the termination" caused the chapter to disband, and it has never been able to regroup." **[DEC. OF JULIAN. ¶¶ 1-8, TAB 7 IN EXCERPTS OF RECORD PP. 136-137]**.

According to the above summarized evidence in the record, Sandberg's agency was terminated either (1) because he had become an active member of an association of agents who were contesting State Farm's attempts to subvert their rights as agents or (2) because he asserted a claim as a policyholder which could alert policyholders who had the same claim (apparently there were many). Under the former, State Farm's proffered reasons for the termination would be a pretext. Under the latter, State Farm's asserted reason would not have constituted a legitimate business goal. Under either scenario, factual issues were clearly presented that must be submitted to a jury for resolution.

State Farm did not present any evidence contesting Sandberg's evidentiary showing regarding the reasons for his termination, and the District Court's decision granting State Farm's motion did not make any findings (or even discuss) the issue of whether good cause existed in this case. The District Court's decision was based entirely upon a legal conclusion that the agency agreement did not require good cause to terminate.

As noted above, this Court concluded that the fact that Sandberg sought punitive damages in his homeowners' action established the requisite good cause for termination. (page 5 of decision). That conclusion overlooked the material facts summarized above going to the issues of (1) pretext and (2) legitimate business purpose, which are jury questions under applicable law.

For these reasons, Sandberg requests that this Court reconsider its conclusion that State Farm had good cause and then remand this case for jury trial to resolve the following two factual issues:

> (1). Whether State Farm's stated reason for termination was a pretext; and,

(2). Whether State Farm's stated reason for termination was related to a legitimate business purpose.

LAW AND ARGUMENT

1. IN CONCLUDING THAT "GOOD CAUSE" EXISTED THIS COURT OVERLOOKED MATERIAL POINTS OF FACT AND LAW.

This Court's de novo review of the District Court's order granting summary judgment required the Court to construe the opposition evidence submitted by Sandberg liberally and the moving papers submitted by State Farm strictly and to resolve any doubts as to whether triable issues of fact exist in favor of Sandberg. (City of Verndon v. Southern Calif. Edison, 1995 F.2d 1361, 1365 [9th Cir. 1992]).

Sandberg submitted substantial evidence in opposition to State Farm's summary judgment motion, establishing triable issues of fact on: (1) whether State Farm's proffered reasons for terminating Sandberg were pretextual, and (2) whether the stated reasons for the termination were related to legitimate business purposes.

State Farm did not present any evidence that contested Sandberg's evidentiary showing on these issues, and the District Court's decision granting State Farm's motion did not discuss the issue whether good cause existed. **[SEE EXCERPTS TAB NO. 13, PP. 171-175]**. As this Court can surmise from the record in this case, almost all of State Farm's efforts in both its lower court motion and in the within appeal were devoted to arguing that its agency agreement was "at will" and did not require good cause for termination. Although a small portion of State Farm's lower court and appeal briefs was devoted to

arguing that State Farm had good cause for the termination, no substantive evidence was presented by State Farm that responded to Sandberg's evidence regarding the real reasons for his termination.

A). **IF AN EMPLOYER'S PROFFERED REASON FOR A TERMINATION IS DISPUTED THE ISSUE OF GOOD CAUSE MUST BE SUBMITTED TO A JURY FOR FACTUAL RESOLUTION.**

As mentioned above, Cotran makes it clear that the definition of good cause is an "objective good faith standard" and that the question whether the standard has been met is a factual issue that is to be submitted to a jury:

> **"The proper inquiry for the jury**, in other words, is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is '**Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?**'" (Id. at 909-910). (emphasis added)

Under this objective standard, an employer's proffered subjective reason for terminating an employee 'for cause' is not determinative. Rather, a factual inquiry is required to determine if the employer's proffered reason for termination was "reached honestly", and that it was not "arbitrary or pretextual".

Relevant California case law makes it clear that if an employer's stated reason for a termination 'for cause' is contested by a terminated employee (on the grounds of pretext, etc.), then, in that event, the issue of good cause cannot be

decided as a matter of law (or 'legal issue'). As noted by the court's decision in Wallis v. Farmers Group, Inc. (1990) 269 Cal.Rptr. 299 [220 Cal.App.3d 718] (which decision was extensively discussed in both Sandberg's and State Farm's appeal briefs regarding the "at will" issue):

> "While we agree that the conflict of interest situation might have provided sufficient cause to justify Marcia's termination, we cannot declare so as a matter of law. If the evidence is uncontradicted and permits only one conclusion, then the issue (of 'good cause') is legal, not factual. (citation omitted). Where, however, as here, the evidence is contradicted, the issue is one for the trier of fact to decide." (Id. at 308) (emphasis added).

[See also Walker v. Blue Cross of California (1992) 6 Cal.Rptr.2d 184 [4 Cal.App.4th 885]--- holding that the factual issue of "good cause" cannot be determined on motion for summary judgment when the proffered good cause reason is contested by the terminated employee as being a "pretextual basis for dismissal". (Id. at 189-191)].

In fact, the court in Wallis v. Farmers rejected Farmer's argument that the lower court had erred in refusing to give a jury instruction (requested by Farmers) that would have greatly expanded the allowable scope that Farmers would have as an insurance company to terminate an independent contractor insurance agent (such as Sandberg) for proffered "conflict of interest grounds". That proposed instruction would have allowed the jury to accept/consider Farmer's contention that an independent agent for an insurance company "occupies a sensitive or confidential position", and, as such, the "company must of necessity be allowed substantial scope for the exercise of subjective judgment in deciding whether to terminate for conflict of interest matters." (Id., at 309-310).

The appellate court rejected this argument; noting that such an instruction (which is generally given if an employee in fact "occupies a sensitive or confidential position") was not improperly refused by the trial court because an independent insurance agent is "not an employee who occupies a sensitive or confidential position". He "is not an employee at all". Rather, he is "an independent contractor". (Id., at 310).

The court's holding in Wallis with respect to Farmer's proposed jury instruction is referenced because it is indicative of the type of 'objective' jury analysis that Sandberg is entitled to receive in the within case, and, as such, is relevant to the within petition.

As previously discussed, substantial evidence was presented by Sandberg that shows that triable fact issues exist in this case as to whether State Farm's stated reason for termination (within the 'definition' discussed above) was a pretext, and/or whether or not the termination decision was reached "in good faith" and for a legitimate business purpose. The above discussed factual matters and applicable law were simply overlooked by this Court in its decision with respect to its "good cause" holding.

B). A RELATED BUT SEPARATE BASIS FOR GRANTING THE WITHIN PETITION IS THAT SANDBERG PRESENTED EVIDENCE THAT RAISED FACT ISSUES AS TO WHETHER STATE FARM'S STATED "GOOD CAUSE" REASON FOR TERMINATION SERVED A LEGITIMATE BUSINESS PURPOSE.

In addition to the required factual inquiry by a jury with respect to the above referenced 'good faith standard' that is applicable to this case, the Supreme Court in Cotran made it clear that the jury also has "a role in resolving the related but

separate issue of whether the reasons assigned by an employer for termination are legally sufficient to constitute good cause" (Id., at 904-905). Although the court in Cotran decided to "leave" the "question of the jury's role" on this issue (i.e., in determining "legally sufficient" "good cause" for proffered business reasons) to later date (as far as setting forth an exact 'definition' and/or 'standard' to be used by a jury for this "related but separate" factual inquiry), the decision acknowledges that the legitimacy of an employers "assigned reasons" "for termination" is also to be directed to a jury for factual resolution. (Id., at 904-905). [See also Walker v. Blue Cross of California (1992), supra, at 189-191 --- confirming that lack of "good cause" can be established not only by a 'pretext claim', but also, by a contention that the asserted "good cause" reason is in reality unrelated to legitimate "business needs or goals"; see also Pugh v. See's Candies, Inc. (1988) 250 Cal.Rptr. 195 [203 Cal.App.3d 743] --- holding same, and Foley v. Interactive Data Corp. (1988) 254 Cal.Rptr. 211 [47 Cal.3d 654] --- holding that is a contract is terminable only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision.].

In this regard, Sandberg submitted unrefuted evidence that State Farm learned of the homeowners' suit when it was filed, but took no action until much later -- after it learned that the suit had been dismissed under the statute of limitations. As previously noted, William Seidler (State Farm's regional vice-president) stated that the statements in the homeowner's lawsuit "put us [State Farm] in jeopardy with every policyholder that we dealt with that have a similar type of claim or action" **[SEIDLER DEPO. P.155, L:7-9, EXCERPTS OF RECORD AT TAB 8 P.139]**. Sandberg stated that Seidler told Sandberg that his statements could cost State Farm "millions of dollars" (not as a result of Sandberg's punitive damage claim, but as a result of the misconduct that Sandberg

had discovered). **[SANDBERG DEC. ¶ 31, TAB NO. 6 IN THE EXCERPTS OF RECORD PP. 130-131]**.

Evidence was further presented that the interests of the policyholders, who were the 'owners' of the company in the "mutual" form of organization, were to be given priority by agents over all other interests. **[SANDBERG DEC. ¶ 10, TAB NO. 6 IN EXCERPTS OF RECORD P. 124]**.

Based upon these matters it is clear that triable issues of fact were also raised in this case as to whether the Sandberg insurance agency was terminated by State Farm for reasons that are legally sufficient to constitute good cause, and that such factual inquiry (in addition to the pretext issue) should have also been submitted to a jury. In short, was Sandberg terminated because he asserted a claim as a policyholder that could alert policyholders who had the same type of claim (and to whom he 'owed allegiance'), or was he terminated because he claimed punitive damages in the complaint? Factual issues were clearly presented on this issue; i.e., whether State Farm's reasons for termination constituted a legitimate business purpose or goal.

C). **EVEN ACCEPTING THIS COURT'S CONCLUSION THAT SANDBERG'S CLAIM FOR PUNITIVE DAMAGES WOULD SOMEHOW CONSTITUTE "GOOD CAUSE", TRIABLE ISSUES EXIST AS TO WHETHER THAT WAS ACTUALLY THE REASON FOR THE TERMINATION**.

Related to the above argument is the fact that State Farm did not present any evidence that established that Sandberg was in fact terminated by State Farm because he claimed punitive damages. Mr. Seidler's testimony suggests that he was

terminated simply for pursuing his rights under the policy. This Court has confirmed that Sandberg had the right to do that. [See decision, p.5].

CONCLUSION

For the reasons stated above, Sandberg respectfully requests that this Court reconsider its conclusion that State Farm had good cause to terminate Sandberg, then remand the case for jury trial on the issues discussed herein.

DATED: May 26, 1999

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DATED: May 26, 1999

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[FILED: May 27, 1999]

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD D. SANDBERG; ALBERTA M. SANDBERG; DICK SANDBERG INSURANCE AGENCY, INC., a California Corporation, Plaintiffs-Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation; STATE FARM FIRE AND CASUALTY COMPANY; a corporation; STATE FARM LIFE INSURANCE COMPANY, a corporation; STATE FARM GENERAL INSURANCE COMPANY, a corporation, Defendants-Appellees.	No. 97-55971 D.C. No. CV-96-00323-GLT ORDER

Before: HUG, Chief Judge, BROWNING and NOONAN, Circuit Judges.

The petitions for rehearing are denied.

[FILED: July 9, 1999]

APPENDIX E

The Constitution of the United States of America

Amendment VII (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

APPENDIX F

Federal Rules of Civil Procedure

"Rule 38, Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate.